IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re:	:	Chapter 7 – Judge Bihary
Nationwide Warehouse Storage, LLC, et al. Debtors.	:	Case No. 01-86600-JB
	:	Jointly Administered
HERBERT C. BROADFOOT, II, in his capacity as Chapter 7 Trustee for NWS Holdings, LLC, Nationwide Warehouse & Storage, LLC, Nationwide Storage, LLC, Nationwide North Holdings, Inc., NWS Acquisition, LLC, Nationwide Warehouse & Storage (Puerto Rico) LLC, and Nationwide Warehouse & Storage (Puerto Rico), LLP, Plaintiff, vs. HOWARD BELFORD and John and Jane Does 1 through 20, Defendants.	:	Adversary No. 03-06550 Judge Bonapfel
HERBERT C. BROADFOOT, II, in his capacity as Chapter 7 Trustee for NWS Holdings, LLC, Nationwide Warehouse & Storage, LLC, Nationwide Storage, LLC, Nationwide North Holdings, Inc., NWS Acquisition, LLC, Nationwide Warehouse & Storage (Puerto Rico) LLC, and Nationwide Warehouse & Storage (Puerto Rico), LLP, Plaintiff, vs. DAVID BELFORD and John and Jane Does 1through 20, Defendants.	:	Adversary No. 03-06551 Judge Bonapfel

ORDER WITH REGARD TO TURNOVER OF DOCUMENTS

Brothers Howard and David Belford were the shareholders of Nationwide Warehouse & Storage, Inc. ("Nationwide"), one of the debtors in these jointly administered chapter 7 cases. In March 1999, the Belfords received approximately $70 million for their shares in a leveraged buyout. The chapter 7 Trustee, exercising his avoidance powers under the Bankruptcy Code, filed these adversary proceedings to recover these payments as fraudulent transfers.

About a decade earlier, there were negotiations for a proposed leveraged buyout transaction in which Ira Hechler and a group he had formed would acquire Nationwide and another company, referred to as Nationwide South, owned by others. The Belfords engaged Martin Neidell and his law firm, Stroock & Stroock & Lavan, LLP, to represent them personally, Nationwide, or all of them with regard to the proposed transaction; the dispute over production of documents here turns in part on which of them the Stroock firm represented.

In the course of the negotiations, the Hechler group became aware of an investigation of Howard Belford being conducted by the Federal Bureau of Investigation. The Stroock firm looked into the matter and produced documents that the Trustee now seeks in his Motion to Compel Production of Documents (the "Motion").[1] The Belfords and the Stroock firm have refused to turn over the documents on the grounds that they are within the attorney-client privilege, that they are subject to the work product doctrine, and that the information contained in them is neither relevant nor likely to lead to the discovery of relevant information.

The Court finds that Mr. Neidell and the Stroock firm represented both Nationwide and the Belfords. 11 U.S.C. § 542 authorizes the Court to order an attorney or other person that holds

[1]The documents are those listed on the Belfords' supplemental privilege log with Bates stamp labels STRPRIV 00006-00010, STRPRIV00143, STRPRIV00499-00510, STRPRIV 00538-00540, and STRPRIV00556-00564.

documents relating to the debtor's property or financial affairs to turn them over or disclose them to the trustee, subject to any applicable privilege. Because the Stroock attorneys prepared the documents in the course of representing Nationwide as the subject of a proposed leveraged buyout transaction, the Court concludes that the documents relate to the debtor's property or financial affairs. The work product doctrine does not prevent disclosure under § 542, *see In re American Metrocomm Corp.,* 274 B.R. 641, 656 (Bankr. D. Del. 2002), and relevance as an evidentiary or discovery matter is not a condition to turnover or disclosure under § 542.

Consequently, the Trustee is entitled to the documents under § 542 unless the Belfords have a privilege that precludes their disclosure. This opinion considers the attorney-client privilege asserted by the Belfords and concludes that the Belfords have not demonstrated its applicability. The Trustee, therefore, is entitled to the documents.

I. Facts[2]

In 1989, Mr. Martin Neidell, a corporate and securities lawyer and partner in the law firm of Stroock & Stroock & Lavan with substantial experience in leveraged buyouts, received a telephone call from a lawyer representing the Hechler group in a proposed transaction for the acquisition of Nationwide. The lawyer asked Mr. Neidell if he would be interested in representing the Belfords in connection with the transaction. (Neidell Dep. 9). Mr. Neidell opened a file with his firm's usual new client form that identified the client as "Nationwide Warehouse & Storage, Inc." and described the matter as "sale of business." (Exhibit C[3]). This

[2]The parties have agreed that the record for purposes of the Motion consists of the items attached to the briefs submitted in connection with the Motion.

[3]References to Exhibits are to the exhibits attached to the Trustee's Brief.

was the first of four matters in which Mr. Neidell and his firm represented the Belfords or Nationwide. Although Mr. Neidell testified that he thought he represented the Belfords in these transactions (Neidell Dep. 11), it appears that the law firm's internal documents regularly identified the client as Nationwide. (Neidell Dep. 16-18). No engagement letters have been produced, and it appears that there may not have been any. (Neidell Dep. 14).

Howard Belford testified as follows with regard to the subject representation (H. Belford Dep.66-67):

Q. Was Mr. Neidell retained by the company, Nationwide North,[4] in the late 1980s?

A. Yes.

Q. And he was paid for whatever services he rendered by Nationwide North, is that right sir?

A. Yes.

Q. He was not hired by you and your brother individually, was he, sir?

A. I don't remember.

During the course of negotiations, the Hechler group became concerned about an alleged FBI investigation, perhaps informal, of the Belfords. (Neidell Dep. 19-22; Exhibit H). It appears that the investigation created a problem that caused the proposed transaction not to close. (Neidell Dep. 19; Margol Dep. 16-17, 66-68). After the problem arose, the Stroock firm looked into the status of the alleged FBI inquiry, with one of Mr. Neidell's partners, Joel Cohen, an experienced white collar defense lawyer, taking charge of this project . (Neidell Dep. 19-22, 95).

[4]The parties and their counsel sometimes refer to Nationwide as "Nationwide North," as in this instance.

The law firm's work led Mr. Neidell to the conclusion that the allegations were "totally untrue and totally incorrect." (Neidell Dep. 20). The documents that the Trustee seeks were produced in connection with this aspect of the Stroock firm's legal services.

The record does not indicate who made the decision to have the Stroock firm perform services related to the FBI situation, the scope of that undertaking, what documents the lawyers reviewed, or what persons they interviewed in the course of their work. There is no evidence that indicates that the Belfords, Mr. Neidell, or Mr. Cohen treated the legal services provided with regard to the FBI investigation any differently from other legal services rendered in connection with the proposed Hechler transaction.

Although it is not clear what the Stroock lawyers did in this regard, Mr. Neidell's testimony reveals something of the nature of the firm's work (Neidell Dep. 20):

> [The allegations] were based on the fact that apparently the Belfords had been spending some money. I think Howard may have made some trips, and they didn't know where they got the cash. And once we were able to show them audited financial statements for Nationwide Warehouse and get some other involvements, we were able to have them drop the allegations and conclude that they were totally off base.

It is a fair inference from the evidence that the Stroock firm was asked to look into the FBI investigation because it was materially related to Nationwide, the subject of the proposed transaction. The Hechler group obviously would not want to acquire a company that would be involved in criminal proceedings that could adversely affect its business operations. The fact that the Stroock lawyers showed Nationwide's financial statements to the FBI investigators

establishes that the Stroock firm's work in this regard involved the financial affairs of Nationwide.

In July 1991, the parties were negotiating the terms of a letter of intent. (Exhibits M and N). As sent to Mr. Neidell, the proposed letter of intent was to be executed by Nationwide, the Belfords, and other parties. (Exhibit M). Mr. Neidell marked up the draft and struck the names of the individuals as signatories, adding the handwritten comment, "Let's just have the companies sign." Howard Belford signed the revised letter of intent as president of Nationwide. (Exhibit N).

The proposed transaction as set forth in the letter of intent was the Hechler group's acquisition of Nationwide's (and other companies') stock from the shareholders through a leveraged buyout. In such a transaction, of course, the selling parties are the individual shareholders, not the corporate entity whose stock they own. In a strict legal sense, a change of ownership does not necessarily affect the corporation's legal status or interests; in any event, its participation as a party in such a transaction is not legally required in order to conclude it.

Nevertheless, because the purchaser's interest in acquiring the stock is to control the corporation, the purchaser has a vital interest in all aspects of the corporation's situation, including the nature, status, and amount of its assets and liabilities; the viability of its business operations and its relationships with employees, suppliers and customers; and its legal, contractual, accounting, and financial affairs. Thus, even if not legally affected by a purchaser's acquisition of its shares or a necessary party to their transfer, the corporation as the subject of the transaction is a material participant in the transaction. The corporation's essential involvement is even more important in a leveraged buyout that contemplates the pledge of its assets to secure financing that will fund the purchase price.

These considerations are reflected in the proposed letter of intent, which imposes material obligations on the part of Nationwide and gives it certain rights. Thus, the letter of intent: required Nationwide to make its facilities, personnel, accountants, and financial information and books and records available to the purchaser; committed Nationwide to use all commercially reasonable efforts to preserve its reputation, goodwill, and relationships with employees, customers, and suppliers; and provided that financing necessary to consummate the transaction be on terms satisfactory to Nationwide. (Exhibits M, N). As a central participant in the transaction with real, if not strictly legal, interests, Nationwide was thoroughly involved in the transaction and had its own duties and rights. Obviously, the reality of its essential role in the proposed transaction is underscored by the fact that it was a signatory to the letter of intent. In these circumstances, it was appropriate, if not necessary, for Nationwide to have legal advice and representation.

II. Discussion

As stated above, § 542 requires the turnover of the documents to the Trustee unless they are privileged. The Belfords contend that the documents are subject to the attorney-client privilege because the Stroock firm prepared them in the course of representing them in their individual capacities. The Trustee contends that the Stroock firm represented Nationwide and that, as its bankruptcy trustee, he has waived any attorney-client privilege with regard to the documents under the authority of *Commodity Futures Trading Comm'n v. Weintraub,* 471 U.S. 343 (1985).

At the outset, the Court notes that the attorney-client privilege applies only to communications between lawyer and client, not to communications between a lawyer and a third party in the course of representation of the client. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 68-70 (2000). The Belfords have not attempted to describe the

documents in question or the information in them other than to note that they "all pertain to Mr. Cohen and Mr. Neidell's handwritten notes, memos, and impressions with regard to their investigation (and potential defense of) the alleged FBI inquiry into the Belfords' personal finances."[5] It is arguable, therefore, that the Belfords' privilege claim fails because they have not met an essential condition for invoking the attorney-client privilege, *i.e.,* that the documents contain communications between lawyer and client as opposed to information obtained from other sources (including, in the context of these proceedings, employees of Nationwide, since the attorney-client privilege the Belfords claim is not based on Nationwide's privilege).

The Court could explore this issue further by accepting the Belfords' invitation to conduct an *in camera* review of the documents. The Court will instead assume, for present purposes, that the documents consist entirely of communications between the attorneys and the Belfords.

The Court declines to determine whether the Stroock firm represented the Belfords or Nationwide in connection with the Hechler matter because the logical conclusion from the facts is that the firm represented all of them. Although the Belfords had the actual economic interest in the transaction, the corporation was a material participant and actor. Moreover, it was a signatory to the letter of intent; as Mr. Neidell correctly observes, if a deal ends up being signed by a corporate entity, the lawyer has to represent it in connection with the transaction. (Neidell Dep. 12). At bottom, the most likely truth of the matter is that the parties and their counsel paid little, if any, attention to the exact identity of the client. Given that all of them had material interests in the matter and were necessary participants in it, that they did not contemporaneously document or otherwise definitively settle on who the client was, and that they made no effort to

[5]Response in Opposition to Trustee's Motion to Compel Production of Privileged and Irrelevant Documents at 7 [Docket Nos. 155 (No. 03-6550) and 156 (No. 03-6551).

distinguish services to the Belfords from services to Nationwide, the Court is compelled to conclude that the firm represented all of them as co-clients.

The general rule in a co-client situation is that one client may not invoke the attorney-client privilege against another. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 75(2) (2000). Under this rule, there is no basis on which the Belfords may claim a privilege in the documents as against the Trustee, who, under *Weintraub*, *supra,* now has the rights of the co-client.

But courts have permitted a corporate officer, under certain circumstances, to invoke the privilege against a corporation when the officer in his individual capacity seeks legal advice pertaining to personal matters from the company's counsel. *See, e.g., In re Bevill, Bresler, & Schulman Asset Management Corp*., 805 F.2d 120 (3d Cir. 1986); *cf., e.g., In re Grand Jury Proceedings,* 156 F.3d 1038 (10th Cir. 1998); *In re Grand Jury Subpoena,* 274 F.3d 563 (1st Cir. 2001); *In re Grand Jury Investigation No. 83-30557,* 575 F. Supp. 777 (N.D. Ga. 1983). To successfully invoke the privilege under these authorities, the Belfords must satisfy a five-prong test:

> First, they must show they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the [counsel] saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with [counsel] were confidential. And, fifth,

> they must show that the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company.

Bevill, 805 F.2d at 123 *(quoting In re Grand Jury Investigation No. 83-30557, supra,* 575 F. Supp. at 780).

The Belfords have not met their burden under this test. Nothing in the record establishes that the Stroock firm undertook to communicate with the Belfords solely in their individual capacities, and there is not even a hint that counsel recognized that a possible conflict between the Belfords and Nationwide could arise. Clearly, the third prong has not been established.

The facts of this case also show, at a minimum, that the Belfords and counsel made little, if any, contemporaneous effort to sort out who the clients were, to consider the possibility of conflicts, or to distinguish services provided to the Belfords in their individual capacities from services on behalf of Nationwide. Under these circumstances, the Court cannot conclude that the Belfords made it *clear* that they were seeking legal advice in their individual rather than in their representative capacities, as the second prong requires.

Finally, Mr. Neidell's testimony summarizing the results of his firm's work with regard to the FBI investigation demonstrates that the services involved communications with the FBI about the financial situation of the co-client, Nationwide (Neidell Dep. 20), and it appears that the investigation was a material, if not the sole, cause of the inability of the parties to conclude the transaction. (Neidell Dep. 19). These facts give rise to inferences that the Hechler group was worried about the FBI investigation because it might involve Nationwide and that the Stroock firm's work was in response to that concern. This, in turn, tends to indicate that the documents and communications from the Belfords set forth in them related more to the objective of excluding Nationwide as being involved than to a purpose of demonstrating that the Belfords had not been engaged in any improper activity, even if unrelated to Nationwide. There is little other

evidence relating to this issue. Thus, the Belfords have not convinced the Court that the communications focused on the Belfords' personal rights and liabilities as the fifth prong requires. *See In re Grand Jury Subpoena,* 274 F.3d 563, 572 (1st Cir. 2001); *In re Grand Jury Proceedings,* 156 F.3d 1038, 1041 (10th Cir. 1998).

Based on the foregoing, the Court concludes that the documents are not subject to an attorney-client privilege on the part of the Belfords. Pursuant to 11 U.S.C. § 542, the Trustee is entitled to them.

III. Confidentiality of the Documents

The Court is concerned that the documents, although not privileged, may nevertheless contain highly confidential information, the unnecessary disclosure of which might be prejudicial to the Belfords. The Bankruptcy Code provides that the Court may protect parties in interest from unwarranted disclosure of such documents. 11 U.S.C. §(b). If the documents are not admissible as evidence in these proceedings, the interests of the Belfords in maintaining their confidentiality should be protected. Accordingly, the Court will order confidentiality protections with regard to the documents as set forth below.

IV. Order

Based on the foregoing, it is hereby **ORDERED and ADJUDGED** as follows:

1. The Belfords shall produce the documents requested by the Trustee (as identified in footnote 1 hereof) within ten days of the entry of an order protecting their confidentiality as contemplated by the following paragraph.

2. Counsel for the Trustee and the Belfords shall confer in a good faith effort to submit a proposed consent order that will maintain the confidentiality of the documents and the information contained therein, subject to the appropriate interests of the Trustee in utilizing that information in the administration of these cases and the prosecution of these adversary

proceedings. Within ten days from the date of entry of this Order, counsel shall either submit a proposed consent order or separate proposed orders for the Court's consideration. Each party may submit written argument in connection with the proposed order if the parties do not reach agreement.

IT IS SO ORDERED this ___ day of _____, 2005.

_____
PAUL W. BONAPFEL
UNITED STATES BANKRUPTCY JUDGE